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Before the  
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In the Matter of )  
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Telecommunications Services )  
Inside Wiring )  
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Customer Premises Equipment )  
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In the Matter of )  
)  
Implementation of the Cable )  
Television Consumer Protection )  
and Competition Act of 1992: )  
)  
Cable Home Wiring )  
)

CS Docket No. 95-184

MM Docket No. 92-260

COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION  
ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

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December 23, 1997

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**COMMENTS OF THE CABLE TELECOMMUNICATIONS ASSOCIATION  
ON SECOND FURTHER NOTICE OF PROPOSED RULEMAKING**

The Cable Telecommunications Association ("CATA") submits these comments on the FCC's Second Further Notice of Proposed Rulemaking ("Second Notice") in this proceeding.<sup>1/</sup>

CATA is a trade association representing owners and operators of cable television systems serving approximately 80 percent of the nation's more than 66 million cable households.

CATA's members will be directly affected by the Commission's actions, particularly if the FCC creates an imbalanced competitive environment by allowing cable's competitors to enter into exclusive contracts with multiple dwelling unit ("MDU") owners while barring cable operators

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<sup>1/</sup> Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-304 ¶¶ 258-266 (rel. October 17, 1997).

from competing for the same type of exclusive contract. This is the single issue CATA intends to address in its initial Comments on the Second Notice.

CATA, in its prior comments in this docket,<sup>2/</sup> contended that the FCC has no statutory authority to require cable operators to dispose of their inside MDU home run wiring by sale or abandonment or removal under the mandatory procedures the FCC adopted in its October 17, 1997 Report and Order in this proceeding. In fact, as CATA pointed out, specific provisions of the Communications Act, the 1992 Cable Act, and the Telecommunications Act of 1996 affirmatively indicate that the Commission's authority over MDU wiring stops at the current demarcation point at the tenant's individual dwelling.<sup>3/</sup>

CATA also argued that the FCC has available to it the means to lessen the incentive of unscrupulous landlords to use the procedures for transfer of a cable operator's inside MDU wiring solely to obtain a monetary premium from a competitor to cable in exchange for granting exclusive rights to provide video service to their MDUs. CATA proposed that the FCC limit its proposed procedures to situations where no premium is paid to a landlord for access to the building.

As CATA noted, without the prospect of a big payoff, landlords will be more likely to use the substantial power granted by the Commission only to further the best interests of their tenants. The FCC, CATA said, should not lose sight of the fact that it is not charged with protecting the interests of MDU owners, but the interests of their tenants as subscribers to video services. Such a condition for invoking the FCC's inside MDU wiring procedures would lessen

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<sup>2/</sup> CATA Comments on Further Notice of Proposed Ruling, filed September 25, 1997, at 3-8.

<sup>3/</sup> The Commission's Report and Order is now the subject of a Petition for Review in the Eighth Circuit. Charter Communications, Inc. v. FCC, Case No. 97-4120 (filed November 24,

the likelihood that landlords would use their substantial procedural advantage over cable operators to further their own interests rather than subscriber choice.

The FCC did not adopt CATA's proposal that it provide a disincentive to landlords to extort a premium for exclusive access to their buildings in its Report and Order. That issue has, however, been raised again through a recently filed Petition for Reconsideration of the Report and Order that takes the same position as CATA and makes similar arguments in support of it.<sup>4/</sup> The Commission now asks instead, in the Second Notice, whether it should place a cap on the length of MDU owners' exclusive contracts with multichannel video providers. Alternatively, it proposes to place limits on such contracts only when entered into with cable television operators, but allow such exclusive agreements to be negotiated and entered into with other multichannel providers such as MMDS, SMATV, and DBS providers, and, presumably, telephone company overbuilders.

The FCC does not directly make the proposal to restrict only cable operators' exclusive contracts. But, at one point in the Second Notice,<sup>5/</sup> the Commission proposes restricting MVPDs "with market power" from entering into and enforcing exclusive service contracts. The FCC then expresses concerns about the administrative practicability of making market power determinations on a "widespread, case-by-case basis," and proposes to establish "presumptions" as to which entities hold such power.

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1997).

<sup>4/</sup> Time Warner Cable Petition for Reconsideration, CS Docket No. 95-184, filed December 15, 1997, at 13-15.

<sup>5/</sup> Second Notice at ¶ 261.

CATA is concerned that the term “MVPDs with market power” is FCC code for cable television operators. This fear stems in part from the fact that earlier in the Second Notice the FCC notes that cable competitors have argued that only “incumbent cable operators” should be denied the ability to enter into exclusive MDU contracts.<sup>6/</sup>

In fact, cable television operators do not have market power when competing with an MMDS, SMATV or DBS operator -- or a telco overbuilder using the OVS scheme -- for an individual MDU. Cable operators are actually at a market disadvantage in these situations. They have a duty, unlike these competitors, to serve every home within a franchise area. This restricts a cable operator’s flexibility to “cream-skim” only certain MDUs. Cable operators have numerous other regulatory restraints, such as must-carry, PEG access and leased access, that also place them at a significant economic disadvantage in competing for an exclusive MDU arrangement, especially if the landlord is seeking a significant premium for the exclusive right to serve that building.

CATA takes no position on whether all exclusive contracts are necessarily good or bad. Some parties will argue that exclusivity can in some circumstances be used as a legitimate pro-competitive economic tool, allowing a provider to offer better services more efficiently and at a lower cost to an MDU. Others will argue that since unit-by-unit competition within MDUs, with no exclusivity for any provider, provides greater choice at the subscriber level, this concern should be paramount.

But of one thing CATA is certain: Whatever the FCC decides on this issue, it should not play the role of handicapper in the competition between cable and other multichannel video providers. This is as true when two or more video providers are competing for an exclusive

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<sup>6/</sup> Id. at ¶ 258.

agreement to serve a particular building or development as it is when they compete for a municipal franchise . If the FCC decides that exclusive arrangements make sense, then they make sense for all multichannel video competitors. If the FCC finds they do not serve a valid public policy purpose if entered into by cable operators, then they do not serve a valid public policy purpose when entered into by a SMATV or MMDS or DBS operator. The efficiencies of exclusivity, or the advantages of two-wire competition, are values that do not change based on the identity of the video provider. The only relevant market is the MDU itself.

The FCC should not attempt to place an even heavier thumb on the balance of competition within MDUs than it already has. Throughout its Report and Order it stated a desire to act even-handedly, and to respect the rights of private property. Yet the procedures it adopted in that document are clearly intended to kick-start competitors that would otherwise have to run their own inside wiring within an MDU in order to compete with a cable operator that has already fulfilled its universal service obligation under its franchise to wire and service that building.

The FCC should study the results of the actions already taken, many of which are being contested on reconsideration and under court review, before it adopts policies further favoring only certain competitors for viewer choices. To do otherwise could only be perceived as a blatant attempt by the FCC to arbitrarily reduce cable's market share regardless of the impact of those actions on individual customers.

Respectfully submitted,

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